92-1621

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

A. JOYCE PAYNE

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in finding that the Panama Canal Commission is a United States Agency for purposes of determining that wages paid to its employees were not excludable from taxable income as foreign earned income under 26 USC §911 (1988)?

2. Whether the court of appeals' determination that the Panama Canal Commission is a United States Agency violates Articles II and IV of the United States Constitution and is thus unconstitutional?

3. Whether, in relying on the Panama Canal Treaty to determine if the Panama Canal Commission is a United States Agency for purposes of 26 USC §911 the

Court of Appeals relied on a document that violates Article II of the United States Constitution?

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

A. JOYCE PAYNE,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, A. Joyce Payne, respectfully prays for a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit that

was entered in this proceeding on November 25, 1992.[1]

OPINIONS BELOW

The District Court for the District of Vermont granted a Rule 56 Summary Judgment in favor of the United States on November 25, 1991, is reported at 778 F.Supp. 804 D. Vt. 1991, and is reproduced at Appendix A. The opinion of the United States Court of Appeals for the Second Circuit, affirming the granting of summary judgment is unreported and is reproduced at Appendix A.

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[1]An Order granting Petitioner's Motion for Enlargement of Time to File Petition for Writ of Certiorari was entered by the Honorable Associate Justice Thomas on the 22nd day of February, 1993.

JURISDICTION

The judgment of the United States Court of Appeals was entered on November 25, 1992. This petition is filed within the time granted to petitioner by Justice Thomas on February 22, 1993. This Court's jurisdiction is invoked pursuant to 28 USC §1254(1). Jurisdiction in the District Court was invoked pursuant to 28 USC §1346(a)(1), 26 USC §7402 and 26 USC §§ 134, 1345 and 1346(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Articles II and VI of the United States Constitution, 26 USC §911, and Panama Canal Treaty of 1977 which is reproduced at Appendix C.

STATEMENT OF THE CASE

This case involves a dispute over

whether the Panama Canal Commission, an entity created by the Panama Canal Treaty of 1977, was properly designated a United States Agency for purposes of 26 USC §911, the Tax Code section referring to foreign earned income. The petitioner challenges such a designation based on a tax assessment against her. The petitioner also claims that since that entity was designated a United States Agency, its composition violates Article VI of the United States Constitution. Additionally, the petitioner asserts that the Panama Canal Commission is created by an unconstitutional document, the Panama Canal Treaty, and the lower courts' reliance on that document was improper. Due to the

financial ramifications of improperly designating the Panama Canal Commission and in turn the Constitutional implications of such a designation, the Court must clarify the issues left unresolved by the decisions below.

PROCEDURAL BACKGROUND

The petitioner brought this case in the District Court against the United States claiming that certain wages paid to her deceased husband constituted foreign earned income. The Government counterclaimed to recover delinquent taxes, interest and penalties. In addressing the substantive issue of whether compensation paid by the Panama Canal Commission to its United States citizen employees who live and work in Panama

is taxable, the District Court for the District of Vermont granted summary judgment to the Government.

The District Court found for the Government on two grounds: first, that an ostensible tax exemption contained in Article XV of the Agreement in Implementation of Article III of the Panama Canal Treaty of 1977 did not apply to the petitioner based on O'Connor, et ux v. United States, 479 U.S. 27 (1988). Second, regarding the 26 USC §911 issue now before the Court, they found, sua sponte, without the development of a record, that the Panama Canal Commission is a United States Agency.

REASONS FOR GRANTING THE WRIT

I. THE PANAMA CANAL TREATY IS NOT AN AGENCY OF THE UNITED STATES FOR PURPOSES OF 26 USC §911.

Although the Panama Canal Treaty (hereinafter "Treaty") and the Panama Canal Act of 1979 (hereinafter "The Implementation Agreement") both describe the Commission as an "agency" of the United States, as Claims Court Chief Judge Kozinski said in Coplin v. United States, 6 Cl. Court 115 (1984), "its structure and operation differ in fundamental respects from the typical U.S. government agency." Judge Kozinski also described how, in several significant ways, the commission is entirely different from any other United States agency.[2] Viewed in this

[2]Among the significant differences are the presence of foreign nationals on the governing body and in chief

light, these statements and the fact that self proclamation of agency status does not necessarily grant such status, a close examination of the Panama Canal Commission's (hereinafter "Commission") functions, duties and operations is necessary to establish whether it is an agency for purposes of 26 USC §911.

Cases deciding whether a particular government entity is an agency for the purposes of 26 USC §911 do not create a bright line test. The

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administrative positions of the Commission, the ownership of the land and the facility by a foreign sovereign, the obligation phasing out of United States management of the canal, and the disparate and inferior treatment of United States citizen employees of the Commission.

more carefully reasoned cases[3], do outline, however, broad principles, the basis of which many courts seem to agree are controlling on the issue. In rendering its decision the Appellate Court approved of and relied on these principles.

The framework for determining agency status, for purposes of 26 USC §911, requires assessment of the degree of control the United States exercises over the entity. The degree of control is determined by four underlying factors. These four factors are:

1. The power to initiate and terminate;

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[3]See: Morse v. United States, 443 F.2d 1185 (Ct. Cl. 1971); Kalinski v. Commissioner, 528 F.2d 969 (1st Cir. 1976); and McComish v. Commissioner, 580 F.2d 1323 (9th Cir. 1978).

2. The effectuation of government purposes over those of the entity's organizers and members;

3. The exclusion of private profit; and

4. The limitation of membership to government connected persons.

A. Power To Initiate and Terminate

The United States did not, and could not, initiate or create the Panama Canal Commission and it has no power to terminate it. The Commission is authorized by the 1977 Treaty, where it finds its genesis in Article II §3. The Treaty is a joint undertaking between the United States and the Republic of Panama. There would be no treaty and no Commission in the absence of the actions of the Republic of

Panama. Having agreed to the creation of the Commission in the Treaty, the United States is wholly without power to unilaterally terminate the Commission. The Commission automatically terminates by the Treaty's terms on September 30, 1999, and only with the concurrence of both signatory parties could the Commission be terminated at an earlier date.

Although the Second Circuit felt it inappropriate to interpret this factor narrowly, a narrow construction and literal interpretation of those terms is proper, necessary and mandatory.

The terms "initiate" and "terminate" are terms of analysis or art employed to determine the degree of

"control" the United States government exercises over the Panama Canal Commission. The proper inquiry to determine whether or not the Commission passes this factor of control is whether or not the United States government unilaterally "initiated" and whether it can unilaterally "terminate" its existence.

The response to this inquiry is in the negative for both parts. The Commission was a creature of the Treaty between the United States and Panama, with an automatic termination date in 1999 which can not be changed without the affirmative agreement of both parties.

Wherefore, the Commission fails the first of four factors to determine

if the United States government has control over it.

B. The effectuation of government purposes over those of its organizers and members.

The Panama Canal Commission, both under the Treaty and as a practical matter, is a transitional entity created jointly by the United States and Panama to provide for the smooth transfer of management and operation of the Panama Canal from the United States to the Republic of Panama.

Under the Treaty, the United States assumed the duty to participate with Panama to effect this transfer of management power. Ownership of the canal passed to the Republic of Panama when the Treaty became effective and the Canal Zone created by the Isthmian

Canal Convention of 1903 disappeared. As such, the purposes of the Republic of Panama, are at least equal to, if not paramount to, the purposes of the United States.

The United States, in actuality, is acting as managing agent in Panama of Panama's canal, and a trainer of Panamanian nationals so that Panama can run it without United States assistance on January 1, 2000. Accordingly, United States government purposes are not "paramount" over those of its organizers and members of the Commission.

The Second Circuit in disagreement stated that "the plain language of the Treaty is convincing," and went on to quote Treaty language that averred

"[T]he United States of America shall...carry out its responsibilities [under the Treaty] by means of a United States Government agency called the Panama Canal Commission..." The Court also determined that the Commission was established to effectuate the government's responsibilities and duties under the Treaty.

The inquiry for the control factor is whether the Commission was established to effectuate government purposes. Even if it is true that the Commission was established to carry out the United States' responsibilities under the Treaty, the inquiry must naturally become whether United States responsibilities under the Treaty were established to effectuate government

Section 911(b)(1)(B)(ii), this rule of strict construction means we must interpret the word"agency" broadly. Groves v. United States, 533 F.2d 1376, 1383 (5th Cir. 1976), cert. denied, 429 U.S. 1000, 97 S.Ct. 529, 50 L.Ed.2d 611 (1976).

Most courts faced with the issue of whether an agency's wages are exempt from federal income taxation have looked to the degree of control the government exercises over the entity. See Kalinski v. Commissioner, 528 F.2d 969 (1st Cir. 1976). The power to initiate and to terminate, the effectuation of government purposes paramount over those of organizers and members, the exclusion of private profit, and the limitation of

membership to government connected persons all serve to identify an agency. Id. at 973 (quoting Morse v. United States, 443 F.2d 1184, 1188, 195 Ct.Cl. 1 (1971), cert. denied, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 45 (1972)).

The United States has almost complete control over the activities of the PCC. The PCC is supervised by a board composed of nine members, a majority of which must be United States nationals. 22 U.S.C. §3612(a). The President of the United States has the power to appoint members of the PCC's board and in addition, the power to remove them, regardless of their nationality. 22 U.S.C. §3612(b). A quorum for the transaction of PCC

business consists of a majority of board members of which a majority of those present are United States nationals. Members of the board who are United States nationals are required to cast their votes in the manner directed by the Secretary of Defense. 22 U.S.C. §3612(a). Thus, the Secretary of Defense controls the outcome of any vote of the board, indicating the PCC is an agency of the United States.

The PCC meets another element of the control test if it effectuates government purposes as opposed to those of its organizers and members.[4] The

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[4]Some courts emphasize this factor to determine whether an entity is an agency of the United States. See Groves v. United States, 533 F.2d at 1383-84.

PCC is not a commercial venture; the operation of the Canal is a governmental exercise of the power of Congress to regulate commerce, rather than a proprietary or business activity of the government. McGehee v.Panma Canal Commission, 872 F.2d 1213, 1218 (5th Cir. 1989) (citing Rogers v. Graves, 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306 (1937).

The signing of the Panama Canal Treaty of 1977 and the replacement of the Panama Canal Company with the Panama Canal Commission served to further emphasize the governmental nature of the Canal's operation as opposed to its commercial aspects.[5]

[5]Payne argues that the fact the 1977 Treaty transferred sovereignty over the Canal Zone to the Republic of

While the Treaty and accompanying legislation vested the PCC with the power to perform a range of duties in the exercise of the rights of the United States with respect to management, operation, and maintenance of the Canal, they stripped the PCC of the power to perform many of the commercial activities previously

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Panama with the result that the PCC now opeates within an area outside United States sovereignty indicates the PCC is not a United States agency. However, we believe it is the function of the entity in question, not the area in which it operates, that lies at the heart of the inquiry into whether it is a United States agency. Cf. Groves, 533 F.2d at 1284 (in reference to the Government of the Trust Territory of the Pacific Islands, an entity is an agency if its duties encompass fucntions which fall within the repsonsiblity of the United States, whether that responsiblity and its correlative power derive from sovereignty or from a truteeship agreement).

performed by the Panama Canal Company. The Treaty spun these collateral revenue producing businesses off to the Republic of Panama, leaving the operation of the Canal as the sole remaining mission of the PCC. Id. at 1218 (citing Hearings on HR 111 before Subcomm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 96-1 (1979) (Statement of Rep. Murphy). Thus, an analysis of the PCC under the governmental function test indicates it is an agency of the United States.

The PCC meets another element of the control test if it generates only governmental revenue as opposed to private profits. The PCC is required to deposit all its receipts in the Panama Canal Revolving Fund and cannot

spend any of this money unless specifically authorzed by law. 22 U.S.C. §3712(c)(1). The Revolving Fund is part of the United States Treasury and its assets are available to carry out the purposes, functions, and powers of the PCC. 22 U.S.C. §3712(a)(1). There are no provisions for private profit, and accordingly, the PCC meets this aspect of the control test.[6]

The final element of the contol test is whether PCC membership is limited to government connected

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[6]Payne argues that the fact the PCC is permitted to operate at a profit suggests the body is not a federal agency. We believe it is not the capacity to produce revenues in excess of expenditures, but rather,the inurement of profit to private interests, that is the strongest indicator an entity is not a federal agency. See Kalinski, 528 F.2d at 973 n. 13.

persons. All PCC employees are subject to the same duties and responsibilities as federal employees and must conform to a code of conduct that by statute incorporates restrictions substantially equivalent to provisions of law applicable to federal employees. 22 U.S.C. §3622(a); 22 U.S.C. §3622(b).[7] The head of any federal agency may enter into an agreement by which employees of that agency may serve a tour with the PCC and later return to their original employer without loss of pay, seniority, or other rights and benefits. 22 U.S.C.§3643(a). An employee who is denied reemployment

[7]The existing provisions include provisions relating to bribery, graft, and conflicts of interest, and the Ethics in Government Act. 22 U.S.C. §3622(b).

with his agency after service with the PCC can appeal to the Merit Systems Protection Board, even if he or she does not enjoy a veteran's preference. Noble v. Tennessee Valley Authority, 892 F.2d 1013, 1016 (Fed. Cir. 1989) (citing 5 C.F.R. 352.909), cert. denied, ____ U.S. ____, 110 S.Ct. 3214, 110 L.Ed.2d 622 (1990). The Federal Labor Relations Authority handles disputes arising between the PCC and its employee unions.[8] Panama Canal Com. v. Federal Labor Relations Authority, 867 F.2d 905 (5th Cir.

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[8]The purpose of the Federal Labor Relations Authority is to prescribe certain rights and obligations of the employees of the federal government and to establish procedures which are designed to meet the special requirements and needs of the government. 5 U.S.C. §7101(b).

1989). There are many other protections and restrictions applicable to PCC employees that are also distinctly similar to those accorded by the United States to its employees. However, we have already listed an adequate sample to show PCC employment is sufficiently connected to the government to satisfy this element of the control test.

The PCC is controlled by the United States government, operates to serve governmental purposes, does not benefit private interests, and is limited to government connected persons. Therefore, the essential characteristics of the PCC identify it as an agency of the United States, making the wages it pays subject to

federal income taxation.[9]

An analysis of the policies underlying Section 911 also indicates it is an agency for the purposes of the section. The section is designed to encourage citizens of the United States to go abroad to share technical skills. To place these venturesome citizens on an equal footing with citizens and other foreign nationals residing in the host country, who often are not taxed by their own nation, Congress eliminated the possibility of their being taxed by both the United States and the host country by allowing them to exclude their foreign earned income

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[9]Nothing in the cases suggest each and every element of the four part test must be met in order to attain agency status. Even if this were the case, the PCC satisfies each of them.

from their gross income for purposes of computing federal income tax. Congress added the exception for amounts paid by the United States government or an agency thereof to prevent a windfall to United States government employees in foreign countries. Since treaty provisions usually exclude United States government employees from paying income tax to their host country, excluding them from paying federal income taxes on their foreign earned wages was not necessary or desirable. See Smith v. Commissioner, 701 F.2d 807 (9th Cir. 1983) (citing McComish v. Commissioner, 580 F.2d 1323 (9th Cir. 1978.)). In O'Connor, 479 U.S. 27, 107 S.Ct. 347, the Supreme Court held that the Treaty of 1977 exempted from

Panamanian taxation wages earned by United States citizens employed by the PCC. Thus, subjecting Payne's PCC wages to federal income taxation does not levy a second tax upon them and granting Payne an exemption from federal taxation under Section 911 would free her from paying any income taxes and result in a windfall to her.

The cases cited by Payne do not persuade us the PCC is something other than an agency of the United States nor do they convince us it is necessary to take further evidence to make a decision in this matter. Krichbaum v. United States, 138 F.Supp. 515 (E.D. Tenn. 1956) held that where an agency of the United States merely serves as a conduit for funds paid to the worker

by a foreign nation, the employee's wages are exempt. This view has been expressly disregarded by appellate opinions such as Commissioner v. Wolfe, 361 F.2d 62 (D.C. Cir. 1966), cert. denied, Wolfe v. Commissioner, 385 U.S. 838, 87 S.Ct. 86, 17 L.Ed.2d 72 (1966), that look to the nature of the relationship between the entity and the worker, rather than to the source of the funds ultimately paid to the worker, in determining whether wages are exempt.[10] We favor the Wolfe view

[10]The court in Wolfe looked to factors such as who supervised the employee, who had the power to hire and fire the employee, and who were the actual parties to the employment contract, rather than to the source of funds paid to the employee. Were we to examine these factors here, it is clear the PCC an Payne had a traditional employer- employee relationship. There is no argument to support Payne's view

and therefore, the Commission cannot be designated as a United States Agency for any purpose.

III. IN RELYING ON THE PANAMA CANAL TREATY TO DETERMINE IF THE PANAMA CANAL COMMISSION IS A UNITED STATES AGENCY FOR PURPOSES OF 26 USC §911, THE COURT OF APPEALS RELIED ON A DOCUMENT THAT VIOLATES THE UNITED STATES CONSTITUTION.

A. The Treaty violates Article II of the United States Constitution.

Article III, Section 3, of the Panama Canal Treaty (Treaty) provides in part: "[T]he United States shall...carry out its responsibilities by means of a United States Government agency called the Panama Canal Commission...." Subsection (a) states that "The Commission shall be supervised by a Board composed of nine members...four of whom shall be

Panamanian nationals." Art. III, Sec. 3(a). This provision of the Treaty violates Article II of the United States Constitution[10] in that it delegates to Panama appointment and removal powers that are, notwithstanding Constitutional and judicial exceptions that are not applicable here, reserved for the President of the United States.

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[10]Art.II, sec.2, cl.2, of the constitution reads:
"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or the Heads of Departments." (Emphasis added)

1. Commission Members are "Officers" of the United States for Article II purposes.

The Appointments Clause[11], addresses the power to appoint of "Officers of the United States." Thus, an initial inquiry regarding the constitutionality of the Commission Board provisions of the Treaty under Article II is whether the Panamanian Board members are "officers of the United States" for purposes of the appointments Clause. As will be seen, the case law dictates an affirmative answer to that inquiry.

The Court, in United States v. Germaine, 99 U.S. 508, 509 (1879), stated:

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[11]United States Constitution, Article II, §2, Clause 2.

> "The Constitution for purposes of appointment very clearly divides all its officers into two classes.... That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

The definitive statement pertaining to "Officers" was made by the Court in Buckley v. Valeo, 424 U.S.1 (1976). In Buckley, the Court held, "[T]he fair import [of Germaine] is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'." Buckley, 424 U.S. at 126. The Court proceeded to find that members of the Federal Election Commission were "at

the very least" inferior Officers within the meaning of the Appointments Clause. The Court then defined employees as lesser functionaries subordinate to "Officers of the United States".

Three additional decisions of this Court draw a line between employees and officers. Ex Parte Hennen, 38 U.S. 225, 13 Pet. 230 (1839) which held a clerk of a district court to be an inferior officer. Similarly, in Myers v. United States, 272 U.S. 52 (1926), a postmaster was held to be an inferior officer. Most recently, a special trial judge for the Tax Court was held to be an inferior officer in Freytag v. C.I.R., ___ U.S. ____, 111 S.Ct. 2631 (1991). In Freytag, the Court stated

that the degree of authority exercised by the special trial judges was so significant that it was inconsistent with the classifications of lesser functionaries or employees. There is no bright line test to determine whether an individual is an employee or an officer; Courts must look to the duties and responsibilities of the office in question in making its determination.

Examined in this light, it is nearly indisputable that members of the Board fall into one of the two categories of "Officers of the United States." The Board is responsible for administering not only the Treaty but

the Panama Canal Act (1979)[12] and all amendments thereof as well. The degree of authority exercised by the Board cannot be construed as less significant than that of a postmaster or a special judge for the Tax Court.

2. The methodology for appointing Commission officers is constitutionally flawed.

The Appointments Clause, dictates that "[The President] shall nominate, and ...appoint... all other officers of the United States ...but the Congress may by law vest the Appointment... in the President alone, in the Courts of Law, or in the Heads of Departments." This clause serves to prevent the

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[12]The Panama Canal Act is the enabling legislation enacted by Congress to further delineate the rights and duties of the United States and Panama.

diffusion of the appointment power. The Constitution has bestowed on the President the right and duty of appointing the "Officers" which will execute the laws of the United States.

The Court has been ever vigilant in ensuring compliance with the Appointments Clause. In Buckley v. Valeo, supra, the Court invalidated the portions of the Federal Election Campaign Act which provided for the appointment of Commissioners to the Federal Election Commission. The six voting members of the Commission were to be selected as follows: two by the President, subject to confirmation in both the Senate and the House, two by the President pro tempore of the senate, and two by the Speaker of the

House. The Court found this impermissible as violative of the Appointments Clause.

The Panama Canal Treaty provides: "The Commission shall be supervised by a board composed of nine members...four of whom shall be Panamanian nationals proposed by the Republic of Panama for appointment to such positions by the United States in a timely manner." Art.III, Sec. 3(a). In substance, the Treaty reposes in the Republic of Panama the power to appoint "Officers of the United States." In so doing, the President has abdicated his duty to faithfully execute the laws of the Untied States to Panama.

Although the Court has maintained that the Appointments Clause gave

Congress "significant discretion" to determine where it was proper to vest the appointment of inferior officers, Morrison v. Olson, 487, U.S. 654 (1988), the court was referring to appointment by a "Court of Law". It is unfathomable that the Morrison Court contemplated the Republic of Panama as a proper repository for the power to appoint "Officers of the Untied States.

3. Removal Violations

The President's power to remove executive officers is considered to be a tool necessary for him to execute the laws of the United States. Myers v. U.S., 272 U.S. 52, (1926). The President's power to remove is by no means absolute. However, several variables enter into the equation when

a court seeks to determine whether Congress has interfered with the President's exercise of executive power.

The Court recently provided a test for determining whether there is a violation of the removal clause in Morrison v. Olson, 487 U.S. 654 (1988), where the validity of the independent counsel (hereinafter "IC") was at issue. The Ethics in Government Act provided that the IC could be removed only for 'good cause'. All parties involved assumed, arguendo, that the IC was a purely executive officer, nevertheless, the Court refused to strictly follow Myers. The Court restated the appropriate test as follows: "[T]he real question is

whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." Morrison, 487 U.S. at 691.

This broad test was further explained in Morrison, but was analyzed with a perspective that focussed on separation of powers issues. The court observed that the good cause limitation merely reduced the President's power, it did not in itself enlarge the power of the other branches.

Nonetheless, the Panama Canal Treaty mandates a removal procedure for officers of the Commission that creates restrictions that "impede the President's ability to perform his constitutional duty," as contemplated

by the court in Morrison. The Panama Canal Treaty provides in Article III, Section 3(b):

> Should the Republic of Panama request the United States to remove a Panamanian national from membership on the Board, the United States shall agree to such request.... In case of removal of a Panamanian member of the Board at the initiative of the United States, both Parties will consult in advance in order to reach agreement concerning such removal.

Although the Court permitted the 'good cause' restriction in Morrison, the present case is readily distinguished. The removal limitation in Morrison did not tend to enhance the power of either of the other two branches, but purportedly only marginally reduced the President's own authority. Clearly, the treaty does

not enhance congressional power either. Instead, as with Panama's authority to "propose" members of the board, the provision requiring consultation before removal smacks of unconstitutional delegation, as does Panama's right to unilaterally remove Panamanian members.

B. The treaty ratification process was unconstitutional

The United States Constitution provides: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur..."[13] Historically, the Framers intended the President to negotiate with foreign states, upon advice of the Senate

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[13]United States Constitution, Article II, Section 3 Clause 3.

before negotiation, with continuing Senate advice during the process of negotiation, and, in the end, the President making the treaty to which the Senate had consented. See Louis Henkin, Treaties in a Constitutional Democracy, 10 Mich. J. Intl. L. 406 (1989).

President Carter negotiated with Panama and signed two Treaties in September, 1977. The Senate debated the Treaties in the winter and early spring of 1978. Consent to the Treaties was granted subject to a number of conditions, reservations, and amendments. The major concern of the Senate was insuring American rights with respect to open and free access to the canal. This meant insuring the

right to intervene militarily. This concern was addressed in Condition (1) to the Neutrality Treaty; nominally, the DeConcini Reservation:

> Notwithstanding the provisions of Article V or any other provision of the treaty, if the Canal is closed, or its operations are interfered with, the United States of America and the Republic of Panama shall each <u>independently</u> have the right to take such steps as each deems necessary, in accordance with its constitutional processes, including the use of military force in the Republic of Panama, to reopen the Canal or restore the operations of the Canal, as the case may be.

[Emphasis added].

Panama expressly agreed to this Condition in its Instruments of

Ratification.[14] However, Panama also included in its ratification instruments three paragraphs which did not appear in the American instrument consented to by the Senate. The second paragraph of the three is the center of dispute. It reads:

> It is also the understanding of the Republic of Panama that the actions which either Party may take in the exercise of its rights and the fulfillment of its duties in accordance with the aforesaid Neutrality Treaty, including measures to reopen the Canal or to restore its normal operation, if it should be interrupted or obstructed, will be effected in a manner consistent with the principles of mutual respect and cooperation which the new relationship established by that Treaty is based.

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[14]The full text of Panama's ratification instruments appear only in 17 I.L.M. 817, 834-35 (1978).

[Emphasis added].

These three paragraphs are actually a counter-reservation nullifying the Deconcini Reservation. The Senate did not consent to the final version of the treaty that was signed by Panama.

Although not labeled a Counter-Reservation by the Panamanian government, these three paragraphs must be construed as such since treaties are construed more liberally than private agreements. Voldswagenwerk Aktiengesellschaft v. Schlunk, ____ U.S. ____, 108 S.Ct. 2104 (1988); Air France v. Saks, ____ U.S. ____, 105 S.Ct. 133 (1985). In this light, it is reasonable and proper to rely upon Senate pre-ratification committee

reports and floor debates in order to assist in giving effect to the intent of the parties. U.S. v. Stuart, ____ U.S. ____, 109 S.Ct. 1183 (1989); See also, Restatement (third) of the Foreign Relations Law of the Untied States §314.

In analyzing the two passages listed above, it is clear that the DeConcini statement is inconsistent with the Panamanian statement. The true meaning and purpose of the Reservation can be gleaned from the statement of Senator DeConcini when introducing his precondition during the Senate debates on the Neutrality Treaty:

> The [DeConcini Reservation] contains a very specific reference to the use of military force in Panama. I

> believe these words are absolutely crucial because they establish the American right -- which I am not convinced is adequately provided for either in the body of the treaty or the leadership amendment -- to take military action if the case so warrants. It further makes it clear that the United States can take military action on Panamanian soil without the consent of the Panamanian Government.... If America is to have any rights at all under this treaty, it must have the right to act independently to protect the canal and to keep it open.

[Emphasis added].

Hence, both the language and pre-ratification Senate debates indicate a strong desire of the Senate to reserve to the United States the independent right to intervene militarily, without the consent of the Panamanian Government, to insure the neutrality of

the canal. Looking at the Panamanian statement, it states that "measures to reopen the canal" must be exercised according to the principles of "mutual respect and cooperation."

Clearly, those statements are inconsistent with an independent right of the United States to intervene militarily.

The constitutional defect is that the United States and Panama did not ratify the same treaty. The Neutrality Treaty was rendered nugatory by the absence of Senate consent to the Panamanian additions, which were, in effect, Counter-Reservations. For these reasons as well, the Court of Appeals relied on a document, The Panama Canal Treaty, that violates the

United States Constitution, in their determination that the Panama Canal Commission is a United States Agency for purposes of 26 USC §911.

CONCLUSION

This matter is one of first impression for the Court involving the status of the Panama Canal Commission as an agency of the United States government. For this reason, and others discussed at length herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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A. JOYCE PAYNE

v.

UNITED STATES OF AMERICA

No. 89-110

United States District Court,

D. Vermont.

Nov. 21, 1991

COFFRIN, Senior District Judge.

In 1986, the Internal Revenue Service levied on Payne's bank accounts in partial satisfaction of unpaid 1982 federal income taxes. Payne commenced this action to recover the seized funds, and the Internal Revenue Service counterclaimed to reduce the assessment to judgment and moved for summary

judgment. We find Payne's 1982 income was not exempt from federal income taxation and grant the government's summary judgment motion.

BACKGROUND

In 1982, taxpayer Payne's late husband earned $75,780.00 while working for the Panama Canal Commission ("PCC") in the Republic of Panama. The Paynes reported these wages as gross income on their 1982 federal tax return but excluded the entire amount from their taxable income, claiming the Panama Canal Treaty of 1977 exempted it from taxation. The Internal Revenue Service ("IRS") processed the return and issued a refund.

On March 10, 1986, the IRS made a $106,672.88 assessment against the

Paynes for unpaid 1981 and 1982 taxes. Of this amount, $24,457.00 in back taxes and $9,477.90 in interest related to the 1982 tax year. When Payne did not pay the assessment, the IRS, on February 19, 1987, levied on Payne's bank account and received $32,630.49 which partially satisfied the total Payne allegedly owed.

In 1987, Payne brought suit in this court to recover the funds. She maintained the wages her husband had earned with the PCC were tax-exempt and also attacked the procedure the IRS had used to levy on her bank accounts for the 1981 taxes. The IRS conceded it had acted improperly with respect to the 1981 taxes and we granted summary judgment in Payne's favor on that

portion of her claim. Since we based our decision on the IRS' failure to follow proper procedure, we did not, at that time, resolve the question of whether Mr. Payne's PCC wages were exempt from taxation. Later, we dismissed Payne's 1982 tax year claim without prejudice because she had not initially sought a refund from the IRS, as required.

Having exhausted her administrative remedies, Payne filed this action in April 1989. She maintains her late husband's 1982 wages were exempt from federal income taxation and seeks a refund of the levied funds, plus interest. The United States counterclaimed to reduce the assessment to judgment and moved

for summary judgment. This summary judgment motion is now before the court.

DISCUSSION

I. Jurisdiction

This is a civil action against the United States for the recovery of an internal revenue tax alleged to have been erroneously or illegally assessed or collected. We have original jurisdiction over such matters under 28 U.S.C. §1346(a)(1).

II. Issues

Since 1987, when Payne first brought suit in this court, she has raised three different arguments to support her claim that she is not liable for any taxes on her husband's 1982 wages. First, she argued the

Panama Canal Treaty of 1977 exempted the earnings from federal income taxes. Second, she argued she did not sign the 1982 federal income tax return and is therefore not liable for taxes due, if any. Finally, she argued 26 U.S.C. §911 exempted her husband's wages from federal income taxes.

Following the Supreme Court's decision in O'Connor v. United States, 479 U.S. 27, 107 S.Ct. 347, 92 L.Ed.2d 206 (1986), it is clear the Panama Canal Treaty does not exempt from federal income taxation wages paid to PCC employees who are United States citizens. At oral argument in this matter Payne conceded the applicability of O'Connor to the facts of her case. In her papers, Payne has also admitted

she signed the joint 1982 return and is therefore liable for any taxes due. Plaintiff's Memorandum of Law in Opposition to Government's Motion for Summary Judgment at 1. Thus, Payne's sole remaining argument is that 26 U.S.C. §911 exempted Mr. Payne's 1982 wages from federal income taxation.

III. Standard of Review

The United States, as the moving party, is entitled to summary judgment if no genuine issues of material fact exist and it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The United States has the burden of demonstrating the absence of a material, factual dispute and we, in determining whether the United States has met this burden, must draw all

reasonable inferences and resolve all ambiguities in Payne's favor. Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988). However, we will enter judgment against Payne if she fails to set forth sufficient facts to establish she is entitled to an exemption. See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

IV. Section 911 Claim

Section 911[1] permits United

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[1]§911 reads in pertinent part:
§911 Citizens or residents of the United States living abroad
(a) **Exclusion from gross income.** - At the election of a qualified individual...there shall be excluded from the gross income of such individual, and exempt from taxation under this subtitle, for any taxable year-
(1) the foreign earned income of such individual....
(b) **Foreign earned income.** -

States Citizens who are bona fide residents of a foreign country to elect to exclude from federal income taxation that portion of their income they earn abroad. This exemption is subject to several exceptions and conditions, the most significant of which, for purposes of this matter, makes it inapplicable to wages paid by the United States or

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(1) **Definition.** - For purposes of this section

(A) **In general.** - The term "foreign earned income" with respect to any individual means the amount received by such individual from sources within a foreign county or countries which constitute earned income attributable to services performed by such individual....

(B) **Certain amounts not included in foreign earned income.** - The foreign earned income for an individual shall not include amounts-...

(ii) paid by the United States or an agency thereof to an employee of the United States of an agency thereof....

26 U.S.C. §911 (1982)

an agency thereof to an employee of the United States or an agency thereof. 26 U.S.C. §911(b)(1)(B)(ii). Therefore, if we determine the PCC is a United States agency for purposes of Section 911 then Mr. Payne's wages were not exempt from taxation, and we will grant the United States' motion for summary judgement.

The United States argues the Supreme Court's decision in O'Connor, 479 U.S. 27, 107 S.Ct. 247, forecloses Payne from bringing her Section 911 claim.[2] The United States reasons that in interpreting the Panama Canal

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[2]Since Ms. Payne was not a party to either O'Connor or its companion cases the United States cannot assert that those judgments are conclusive against her in this court. American Triticale Inc. v. Nytco Services, Inc., 664 F.2d 1126 (9th Cir. 1981).

Treaty so as to hold PCC wages subject to federal income taxation, the O'Connor court impliedly swept aside all other arguments in favor of exempting PCC wages, whether analyzed in the opinion or not.

A question not raised by counsel or discussed in the opinion of the court has not been decided merely because it existed in the record and might have been raised and considered. United States v. Mitchell, 271 U.S. 9, 14, 46 S.Ct. 418, 419-20, 70 L.Ed. 799 (1926); Gardella v. Chandler, 172 F.2d 402, 411 (2d Cir. 1949). In O'Connor, the Supreme Court focused solely on 26 U.S.C. Section 894, which involves the interaction of the Internal Revenue Code with government treaty

obligations. The court did not analyze the applicability of Section 911, even though it would have been dispositive of the case had the Court adopted the interpretation favored by Ms. Payne.[3] Therefore, Payne remains free to pursue her Section 911 claim.

As we stated earlier, if we find the PCC is an agency of the United States for purposes of Section 911 we need to go no further and will grant

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[3]Neither O'Connor, 479 U.S. 27, 107 S.Ct. 347 nor its companion case, United States v. Harris, 479 U.S. 957, 107 S.Ct. 450, 93 L.Ed.2d 398 (1986), mentions Section 911. Nor do the decisions at the court of appeals or trial levels. See Coplin v. United States, 6 Cl.Ct. 115 (1984) and Harris v. United States, 768 F.2d 1240 (11th Cir. 1985); Harris v. United States, 585 F.Supp. 862 (S.D.Ga. 1984). In these cases the taxpayers' sole arguments for exempting their PCC wages from federal income taxes was the Treaty of 1977.

the United State's summary judgment motion. The question of whether the PCC is an agency of the United States is a question of federal law to be decided by the court. See Standard Oil Co. v. Johnson, 316 U.S. 481, 483, 62 S.Ct. 1168, 1169, 86 L.Ed. 1611 (1942). We have a sufficient understanding of the relevant standards and the PCC's operations to make this determination without taking further evidence.

Although the term is not defined, there is little question the PCC is an agency of the United States. The legislation establishing the PCC identifies the body as an agency in the executive branch of the United States government. 22 U.S.C. §3611. The PCC is at least partially protected from

suit by the doctrine of sovereign immunity and many claimants are restricted to administrative remedies. See McClain v. Panama Canal Com., 834 F.2d 452 1191 (5th Cir. 1986). Before changing the toll it charges for passage through the Canal the PCC is required to provide notice in the Federal Register and an opportunity for comment. 22 U.S.C. §3794. Other courts have had little trouble categorizing the PCC as a federal agency. For instance, the Tax Court, in McCain v. Commissioner, 81 T.C. 918 (1983), faced the exact issue of whether the PCC is an agency for purposes of Section 911 and concluded it is. In O'Connor itself, Justice Scalia referred to the PCC as a "United

States Government agency." O'Connor, 479 U.S. at 28, 107 S.Ct. at 349.

Although it seems clear that the PCC is an agency of the United States and that the Section 911(b)(1)(B)(ii) exclusion applies to all such agencies, Payne argues that not all agencies are agencies for purposes of Section 911 and that not all compensation paid by such agencies is paid by an agency of the United States.

As a general rule, we will not imply an exemption, but instead, will require the taxpayer to prove it unambiguously. United States v. Wells Fargo Bank, 485 U.S. 351, 108 S.Ct. 1179, 1182, 99 L.Ed.2d 368 (1988). In determining the meaning of agency of the United States for purposes of

Section 911(b)(1)(B)(ii), this rule of strict construction means we must interpret the word"agency" broadly. Groves v. United States, 533 F.2d 1376, 1383 (5th Cir. 1976), cert. denied, 429 U.S. 1000, 97 S.Ct. 529, 50 L.Ed.2d 611 (1976).

Most courts faced with the issue of whether an agency's wages are exempt from federal income taxation have looked to the degree of control the government exercises over the entity. See Kalinski v. Commissioner, 528 F.2d 969 (1st Cir. 1976). The power to initiate and to terminate, the effectuation of government purposes paramount over those of organizers and members, the exclusion of private profit, and the limitation of

membership to government connected persons all serve to identify an agency. Id. at 973 (quoting Morse v. United States, 443 F.2d 1184, 1188, 195 Ct.Cl. 1 (1971), cert. denied, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 45 (1972)).

The United States has almost complete control over the activities of the PCC. The PCC is supervised by a board composed of nine members, a majority of which must be United States nationals. 22 U.S.C. §3612(a). The President of the United States has the power to appoint members of the PCC's board and in addition, the power to remove them, regardless of their nationality. 22 U.S.C. §3612(b). A quorum for the transaction of PCC

business consists of a majority of board members of which a majority of those present are United States nationals. Members of the board who are United States nationals are required to cast their votes in the manner directed by the Secretary of Defense. 22 U.S.C. §3612(a). Thus, the Secretary of Defense controls the outcome of any vote of the board, indicating the PCC is an agency of the United States.

The PCC meets another element of the control test if it effectuates government purposes as opposed to those of its organizers and members.[4] The

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[4]Some courts emphasize this factor to determine whether an entity is an agency of the United States. See Groves v. United States, 533 F.2d at 1383-84.

PCC is not a commercial venture; the operation of the Canal is a governmental exercise of the power of Congress to regulate commerce, rather than a proprietary or business activity of the government. McGehee v.Panma Canal Commission, 872 F.2d 1213, 1218 (5th Cir. 1989) (citing Rogers v. Graves, 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306 (1937).

The signing of the Panama Canal Treaty of 1977 and the replacement of the Panama Canal Company with the Panama Canal Commission served to further emphasize the governmental nature of the Canal's operation as opposed to its commercial aspects.[5]

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[5]Payne argues that the fact the 1977 Treaty transferred sovereignty over the Canal Zone to the Republic of

While the Treaty and accompanying legislation vested the PCC with the power to perform a range of duties in the exercise of the rights of the United States with respect to management, operation, and maintenance of the Canal, they stripped the PCC of the power to perform many of the commercial activities previusly

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Panama with the result that the PCC now opeates within an area outside United States sovereignty indicates the PCC is not a United States agency. However, we believe it is the function of the entity in question, not the area in which it operates, that lies at the heart of the inquiry into whether it is a United States agency. Cf. Groves, 533 F.2d at 1284 (in reference to the Government of the Trust Territory of the Pacific Islands, an entity is an agency if its duties encompass fucntions which fall within the repsonsiblity of the United States, whether that responsiblity and its correlative power derive from sovereignty or from a truteeship agreement).

performed by the Panama Canal Company. The Treaty spun these collateral revenue producing businesses off to the Republic of Panama, leaving the operation of the Canal as the sole remaining mission of the PCC. Id. at 1218 (citing Hearings on HR 111 before Subcomm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. 96-1 (1979) (Statement of Rep. Murphy). Thus, an analysis of the PCC under the governmental function test indicates it is an agency of the United States.

The PCC meets another element of the control test if it generates only governmental revenue as opposed to private profits. The PCC is required to deposit all its receipts in the Panama Canal Revolving Fund and cannot

spend any of this money unless specifically authorzed by law. 22 U.S.C. §3712(c)(1). The Revolving Fund is part of the United States Treasury and its assets are available to carry out the purposes, functions, and powers of the PCC. 22 U.S.C. §3712(a)(1). There are no provisions for private profit, and accordingly, the PCC meets this aspect of the control test.[6]

The final element of the contol test is whether PCC membership is limited to government connected

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[6]Payne argues that the fact the PCC is permitted to operate at a profit suggests the body is not a federal agency. We believe it is not the capacity to produce revenues in excess of expenditures, but rather, the inurement of profit to private interests, that is the strongest indicator an entity is not a federal agency. See Kalinski, 528 F.2d at 973 n. 13.

persons. All PCC employees are subject to the same duties and responsibilities as federal employees and must conform to a code of conduct that by statute incorporates restrictions substantially equivalent to provisions of law applicable to federal employees. 22 U.S.C. §3622(a); 22 U.S.C. §3622(b).[7] The head of any federal agency may enter into an agreement by which employees of that agency may serve a tour with the PCC and later return to their original employer without loss of pay, seniority, or other rights and benefits. 22 U.S.C.§3643(a). An employee who is denied reemployment

[7]The existing provisions include provisions relating to bribery, graft, and conflicts of interest, and the Ethics in Government Act. 22 U.S.C. §3622(b).

with his agency after service with the PCC can appeal to the Merit Systems Protection Board, even if he or she does not enjoy a veteran's preference. Noble v. Tennessee Valley Authority, 892 F.2d 1013, 1016 (Fed. Cir. 1989) (citing 5 C.F.R. 352.909), cert. denied, ____ U.S. ____, 110 S.Ct. 3214, 110 L.Ed.2d 622 (1990). The Federal Labor Relations Authority handles disputes arising between the PCC and its employee unions.[8] Panama Canal Com. v. Federal Labor Relations Authority, 867 F.2d 905 (5th Cir.

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[8]The purpose of the Federal Labor Relations Authority is to prescribe certain rights and obligations of the employees of the federal government and to establish procedures which are designed to meet the special requirements and needs of the government. 5 U.S.C. §7101(b).

1989). There are many other protections and restrictions applicable to PCC employees that are also distinctly similar to those accorded by the United States to its employees. However, we have already listed an adequate sample to show PCC employment is sufficiently connected to the government to satisfy this element of the control test.

The PCC is controlled by the United States government, operates to serve governmental purposes, does not benefit private interests, and is limited to government connected persons. Therefore, the essential characteristics of the PCC identify it as an agency of the United States, making the wages it pays subject to

federal income taxation.[9]

An analysis of the policies underlying Section 911 also indicates it is an agency for the purposes of the section. The section is designed to encourage citizens of the United States to go abroad to share technical skills. To place these venturesome citizens on an equal footing with citizens and other foreign nationals residing in the host country, who often are not taxed by their own nation, Congress eliminated the possibility of their being taxed by both the United States and the host country by allowing them to exclude their foreign earned income

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[9]Nothing in the cases suggest each and every element of the four part test must be met in order to attain agency status. Even if this were the case, the PCC satisfies each of them.

from their gross income for purposes of computing federal income tax. Congress added the exception for amounts paid by the United States government or an agency thereof to prevent a windfall to United States government employees in foreign countries. Since treaty provisions usually exclude United States government employees from paying income tax to their host country, excluding them from paying federal income taxes on their foreign earned wages was not necessary or desirable. See Smith v. Commissioner, 701 F.2d 807 (9th Cir. 1983) (citing McComish v. Commissioner, 580 F.2d 1323 (9th Cir. 1978.)). In O'Connor, 479 U.S. 27, 107 S.Ct. 347, the Supreme Court held that the Treaty of 1977 exempted from

Panamanian taxation wages earned by United States citizens employed by the PCC. Thus, subjecting Payne's PCC wages to federal income taxation does not levy a second tax upon them and granting Payne an exemption from federal taxation under Section 911 would free her from paying any income taxes and result in a windfall to her.

The cases cited by Payne do not persuade us the PCC is something other than an agency of the United States nor do they convince us it is necessary to take further evidence to make a decision in this matter. Krichbaum v. United States, 138 F.Supp. 515 (E.D. Tenn. 1956) held that where an agency of the United States merely serves as a conduit for funds paid to the worker

by a foreign nation, the employee's wages are exempt. This view has been expressly disregarded by appellate opinions such as Commissioner v. Wolfe, 361 F.2d 62 (D.C. Cir. 1966), cert. denied, Wolfe v. Commissioner, 385 U.S. 838, 87 S.Ct. 86, 17 L.Ed.2d 72 (1966), that look to the nature of the relationship between the entity and the worker, rather than to the source of the funds ultimately paid to the worker, in determining whether wages are exempt.[10] We favor the Wolfe view

[10]The court in Wolfe looked to factors such as who supervised the employee, who had the power to hire and fire the employee, and who were the actual parties to the employment contract, rather than to the source of funds paid to the employee. Were we to examine these factors here, it is clear the PCC an Payne had a traditional employer- employee relationship. There is no argument to support Payne's view

because we believe Krichbaum restricts too narrowly the definition of agency by making it depend on who fills the role of payor. See Kalinski, 528 F.2d at 973.

Brummitt v. United States, 329 F.2d 966, 165 Ct. Cl. 78 (1964) merely presents an application of the control test, where the relevant factors indicated the military club in question was not an agency of the United States. In Brummitt, the court found the club's considerable profits inured to private interests, the military exercised no fiscal control over the club or

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that her husband actually worked for the original source of the funds - the vessels passing through the Canal - and the PCC only served as a conduit to pass a portion of those funds to Payne's husband.

conducted any audits,[11] and one could join the club without being connected to the United States government. Thus, the essential elements of control were not present and the court held the club was not an agency of the United States.

McComish v. Commissioner, 580 F.2d 1323 held the Trust Territory of the Pacific Islands was not an agency for purposes of Section 911. It is necessary to contrast this case with Groves v. United States, 533 F.2d 1376 which held the Trust Territory was an agency for purposes of Section 911. The McComish court applied the control test and determined that the Trust

[11]The PCC, on the other hand, is subject to audit by the comptroller General of the United States, who must submit the audit to the Congress. 22 U.S.C. §3723(a).

Territory was not an agency of the United States because the United States could not dissolve the Trust Territory as an entity or change its trusteeship status without the consent of the United Nations.[12] The Groves court

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[12]We also note that the McComish court found the taxpayer in the case would have been subject to local income taxation at the time the case was written and therefore was not one of those employees who would have reaped windfall benefits in the absence of the Section 911 exception. McComish, 580 F.2d at 1326. Contrast this with the instant case where the Treaty of 1977 exempted Payne from paying Panamanian taxes and a like exemption from United States taxes would have created a windfall.

The McComish court also noted the equities of the taxpayer's status counseled against applying the exception to him. Specifically, the court found the fact that McComish received no federal retirement, social security, sickness, or disability benefits and was not exempted from the Federal Tort Claims Act inconsistent with taxing him as if he were a federal

looked at the function of the Trust Territory as well as aspects of control and determined that The Trusteeship Agreement's ceding of powers of administration, legislation, and jurisdiction to the United States[13]

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employee. Assuming arguendo that one should only be required to pay income taxes if they receive fringe benefits from their work, PCC employees are entitled to many of the same benefits as federal employees. See 22 U.S.C. §§3641-3701.

[13]McComish indicates the United State's power of administration is circumscribed by other provisions of the agreement. For instance, the United States is required to promote the development of self-government by the people of the Trust Territory and cannot alter the nature of the agreement without the consent of the United Nations. However, the fact that the United States is required to promote self-government does not prevent it from exercising control. Nor does the United Nations have power to freely alter the trusteeship agreement or to sanction the United States for the way it administers the

America of law enforcement and judicial jurisdiction only during the transition period. The United States of America may amend, repeal or otherwise change such laws, regulations and administrative authority. The two Parties shall consult concerning procedural and substantive matters relative to the implementation of this Article, including the disposition of cases pending at the end of the transition period and, in this respect, may enter into appropriate agreements by an exchange of notes or other instrument.

8. During this transition period, the United States of America may continue to incarcerate individuals in the areas and installations made

available for the use of the United States of America by the Republic of Panama pursuant to this Treaty and related agreements, or to transfer them to penal facilities in the United States of America to serve their sentences.

ARTICLE XII

A Sea-Level Canal or a Third Lane of Locks

1. The United States of America and the Republic of Panama recognize that a sea-level canal may be important for international navigation in the future. Consequently, during the duration of this Treaty, both Parties commit themselves to study jointly the feasibility of a sea-level canal in the Republic of Panama, and in the event they determine that such a waterway is necessary, they shall negotiate terms,

agreeable to both Parties, for its construction.

2. The United States of America and the Republic of Panama agree on the following:

(a) No new interoceanic canal shall be constructed in the territory of the Republic of Panama during the duration of this Treaty, except in accordance with the provisions of this Treaty, or as the two Parties may otherwise agree; and

(b) During the duration of this Treaty, the United States of America shall not negotiate with third States for the right to construct an interoceanic canal on any other route in the Western Hemisphere, except as the two Parties may otherwise agree.

3. The Republic of Panama grants to the United States of America the right to add a third lane of locks to the existing Panama Canal. This right may be exercised at any time during the duration of this Treaty, provided that the United States of America has delivered to the Republic of Panama copies of the plans for such construction.

4. In the event the United States of America exercises the right granted in paragraph 3 above, it may use for that purpose, in addition to the areas otherwise made available to the United States of America pursuant to this Treaty, such other areas as the two Parties may agree upon. The terms and conditions applicable to Canal operating

areas made available by the Republic of Panama for the use of the United States of America pursuant to Article III of this treaty shall apply in a similar manner to such additional areas.

5. In the construction of the aforesaid works, the United States of America shall not use nuclear excavation techniques without the previous consent of the Republic of Panama.

ARTICLE XIII

Property Transfer and
Economic Participation
by the Republic of Panama

1. Upon termination of this Treaty, the Republic of Panama shall assume total responsibility for the management, operation, and maintenance of the Panama Canal, which shall be turned over in operating condition and

free of liens and debts, except as the two parties may otherwise agree.

2. The United States of America transfers, without charge, to the Republic of Panama all right, title and interest the United States of America may have with respect to all real property, including non-removable improvements thereon, as set forth below:

(a) Upon the entry into force of this Treaty, the Panama Railroad and such property that was located in the former Canal Zone but that is not within the land and water areas the use of which is made available to the United States of America pursuant to this Treaty. However, it is agreed that the transfer on such date shall not include

buildings and other facilities, except housing, the use of which is retained by the United States of America pursuant to this Treaty and related agreements, outside such areas;

(b) Such property located in an area or a portion thereof at such time as the use by the United States of America of such area or portion thereof ceases pursuant to agreement between the two Parties.

(c) Housing units made available for occupancy by members of the Armed Forces of the Republic of Panama in accordance with paragraph 5(b) of Annex B to the Agreement in Implementation of Article IV of this Treaty at such time as such units are made available to the Republic of

Panama.

(d) Upon termination of this Treaty, all real property, and non-removable improvements that were used by the United States of America for the purposes of this Treaty and related agreements, and equipment related to the management, operation and maintenance of the Canal remaining in the Republic of Panama.

3. The Republic of Panama agrees to hold the United States of America harmless with respect to any claims which may be made by third parties relating to rights, title and interest in such property.

4. The Republic of Panama shall receive, in addition, from the Panama Canal Commission a just and equitable

return on the national resources which it has dedicated to the efficient management, operation, maintenance, protection and defense of the Panama Canal, in accordance with the following:

(a) An annual amount to be paid out of Canal operating revenues computed at a rate of thirty hundredths of a United States dollar ($0.30) per Panama Canal net ton or its equivalency, for each vessel transiting the Canal, after the entry into force of this Treaty, for which tolls are charged. The rate of thirty hundredths of a United States dollar ($0.30) per Panama Canal net ton, or this equivalency, will be adjusted to reflect changes in the United States wholesale price index[1]

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[1]See related letter, p. 140.

for total manufactured goods during biennial periods. The first adjustment shall take place five years after entry into force of this Treaty, taking into account the changes that occurred in such price index during the preceding two years. Thereafter successsive adjustments shall take place at the end of each biennial period. If the United States of America shbuld decide that another indexing method is preferable, such method shall be proposed to the Republic of Panama and applied if mutually agreed.

(b) A fixed annuity of ten million United States dollars ($10,000,000) to be paid out of Canal operating revenues. This amount shall constitute a fixed expense of the Panama

Canal Commission.

(c) An annual amount of up to ten million United States dollars ($10,000,000) per year, to be paid out of Canal operating revenues to the extent that such revenues exceed expenditures of the Panama Canal Commission including amounts paid pursuant to this Treaty. In the event Canal operating revenues in any year do not produce a surplus sufficient to cover this payment, the unpaid balance shall be paid from operating surpluses in future years in a manner to be mutually agreed.

ARTICLE XIV

Settlement of Disputes

In the event that any question should arise between the Parties

concerning the interpretation of this Treaty or related agreements, they shall make every effort to resolve the matter through consultation in the appropriate committees established pursuant to this treaty and related agreements, or, if appropriate, through diplomatic channels. In the event the Parties are unable to resolve a particular matter through such means, they may, in appropriate cases, agree to submit the matter to conciliation, mediation, arbitration, or such other procedure for the peaceful settlement of the dispute as they may mutually deem appropriate.

ANNEX

Procedures for the Cessation or Transfer of Activities Carried out by the Panama Canal Company and the Canal Zone Government and Illustrative List of the Functions that may be Performed

by the Panama Canal Commission

1. The laws of the Republic of Panama shall regulate the exercise of private economic activities within the areas made available by the Republic of Panama for the use of the United States of America pursuant to this Treaty. Natural or juridical persons who, at least six months prior to the date of signature of this Treaty, were legally established and engaged in the exercise of economic activities in the former Canal Zone, may continue such activities in accordance with the provisions of paragraphs 2-7 of Article IX of this Treaty.

2. The Panama Canal Commission shall not perform governmental or commercial functions as stipulated in

paragraph 4 of this Annex, provided, however, that this shall not be deemed to limit in any way the right of the United States of America to perform those functions that may be necessary for the efficient management, operation and maintenance of the Canal.

3. It is understood that the Panama Canal Commission, in the exercise of the rights of the United States of America with respect to the management, operation and maintenance of the Canal, may perform functions such as are set forth below by way of illustration:

a. Management of the Canal enterprise.

b. Aids to navigation in Canal waters and in proximity thereto.

c. Control of vessel movement.

d. Operation and maintenance of the locks.

e. Tug service of the transit of vessels and dredging for the piers and docks for the Panama Canal Commission.

f. Control of the water levels in Gatun, Alajuela (Madden) and Miraflores Lakes.

g. Non-commercial transportation services in Canal waters.

h. Meteorological and hydrographic services.

i. Admeasurement.

j. Non-commercial motor transport and maintenance.

k. Industrial security through the use of watchmen.

l. Procurement and warehousing.

m. Telecommunications.

n. Protection of the environment by preventing and controlling the spillage of oil and substances harmful to human or animal life and of the ecological equilibrium in areas used in

operation of the canal and the anchorages.

o. Non-commercial vessel repair.

p. Air conditioning services in Canal installations.

q. Industrial sanitation and health services.

r. Engineering design, construction and maintenance of Panama Canal Commission installations.

s. Dredging of the Canal Channel, terminal ports and adjacent waters.

t. Control of the banks and stabilizing of the

slopes of the Canal.

u. Non-commercial handling of cargo on the piers and docks of the Panama Canal Commission.

v. Maintenance of public areas of the Panama Canal Commission, such as parks and gardens.

w. Generation of electric power.

x. Purification and supply of water.

y. Marine salvage in Canal waters.

z. Such other functions as may be necessary or appropriate to carry out, in conformity with

this Treaty and related agreements, the rights and responsibilities of the United States of America with respect to the management, operation and maintenance of the Panama Canal.

4. The following activities and operations carried out by the Panama Canal Company and the Canal Zone Government shall not be carried out by the Panama Canal Commission, effective upon the dates indicated herein:

(a) Upon the date of entry into force of this Treaty:

(i) Wholesale and retail sales, including those through

commissaries, food stores, department stores, optical shops and pastry shops;

(ii) The production of food and drink, including milk products and bakery products;

(iii) The operation of public restaurants and cafeterias and the sale of articles through vending machines;

(iv) The operation of movie theaters, bowling alleys, pool rooms and other recreational and amusement facilities for the use of which a charge is payable;

(v) The operation of laundry and dry cleaning plants other than those operated for official use;

(vi) The repair and service of privately owned automobiles or the sale of petroleum or lubricants, including

the operation of gasoline stations, repair garages and tire repair and recapping facilities, and the repair and service of other privately owned property, including appliances, electronic devices, boats, motors, and furniture;

(vii) The operation of cold storage and freezer plants other than those operated for official use;

(viii) The operation of freight houses other than those operated for official use;

(ix) Commercial services to and supply of privately owned and operated vessels, including the construction of vessels, the sale of petroleum and lubricants and the provision of water, tug services not

related to the Canal or other United States Government operations, and repair of such vessels, except in situations where repairs may be necessary to remove disabled vessels form the Canal;

(x) Printing services other than for official use;

(xi) Maritime transportation for the use of the general public;

(xii) Health and medical services provided to individuals, including hospitals, leprosariums, veterinary, mortuary and cemetery services;

(xiii) Educational services not for professional training, including schools and libraries;

(xiv) Postal services;

(xv) Immigration, customs and

quarantine controls, except those measures necessary to ensure the sanitation of the Canal;

(xvi) Commercial pier and dock services, such as the handling of cargo and passengers; and

(xvii) Any other commercial activity of a similar nature, not related to the management, operation or maintenance of the Canal.

(b) Within thirty calendar months from the date of entry into force of this treaty, governmental services such as:

(i) Police;

(ii) Courts; and

(iii) Prison system.

5. (a) With respect to those activities or functions described in

paragraph 4 above, or otherwise agreed upon by the two Parties, which are to be assumed by the Government of the Republic of Panama or by private persons subject to its authority, the two Parties shall consult prior to the discontinuance of such activities or functions by the Panama Canal Commission to develop appropriate arrangements for the orderly transfer and continued efficient operation or conduct thereof.

(b) In the event that appropriate arrangements cannot be arrived at to ensure the continued performance of a particular activity or function described in paragraph 4 above which is necessary to the efficient management, operation or maintenance of the Canal, the Panama Canal Commission

may, to the extent consistent with the other provisions of this Treaty and related agreements, continue to perform such activity or function until such arrangements can be made.

AGREED MINUTE TO THE PANAMA CANAL TREATY

1. With reference to paragraph 1(c) of Article I (Abrogation of Prior Treaties and Establishment of a New Relationship), it is understood that the treaties, conventions, agreements and exchanges of notes, or portions thereof, abrogated and superseded thereby include:

(a) The Agreement delimiting the Canal Zone referred to in Article II of the Interoceanic Canal Convention of November 18, 1903 signed at Panama on

June 15, 1904.[1]

(b) The Boundary Convention signed at Panama on September 2, 1914.[2]

(c) The convention regarding the Colon Corridor and certain other corridors through the Canal Zone signed at Panama on May 24, 1950.[3]

(d) The Trans-Isthmian Highway Convention signed at Washington on March 2, 1936,[4] the Agreement supplementing that Convention entered into through an exchange of notes signed at Washington on August 31 and September

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[1]10 Bevans 678

[2]TS 610; 38 Stat. 1893; 10 Bevans 702.

[3]TIAS 3180; 6 UST 461.

[4]TS 946; 53 Stat. 1869; 10 Bevans 778

6, 1940,[5] and the arrangement between the United States of America and Panama respecting the Trans-Isthmian Joint Highway Board, entered into through an exchange of notes at Panama on October 19 and 23, 1939.[6]

(e) The Highway Convention between the United States and Panama signed at Panama on September 14, 1950.[7]

(f) The Convention regulating the transit of alcoholic liquors through the Canal zone signed at Panama on March

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[5]EAS 448; 58 Stat. 1593; 10 Bevans 796.

[6]EAS 168 54 Stat. 2278; 10 Bevans 788.

[7]TIAS 3181; 6 UST 480.

14, 1932.[8]

(g) The Protocol of an Agreement restricting use of Panama and Canal Zone waters by belligerents signed at Washington on October 10, 1914.[9]

(h) The Agreement providing for the reciprocal recognition of motor vehicle license plates in Panama and the Canal Zone entered into through an exchange of notes at Panama on December 7 and December 12, 1950,[10] and the Agreement establishing procedures for the reciprocal recognition of motor vehicle operator's licenses in the Canal Zone and Panama entered into through an

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[8]TS 861; 48 Stat. 1488; 10 Bevans 737.

[9]TS 597; 38 Stat. 2042; 10 Bevans 711.

[10]Not printed

exchange of notes at Panama on October 31,.1960.[11]

(i) The General Relations Agreement entered into through an exchange of notes at Washington on May 18, 1942.[12]

(j) Any other treaty, convention, agreement or exchange of notes between the United States and the Republic of Panama, or portions thereof, concerning the Panama Canal which was entered into prior to the entry into force of the Panama Canal Treaty.

2. It is further understood that the following treaties, conventions, agreements and exchanges of notes between the two Parties are not affected

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[11]TIAS 4716; 12 UST 301.

[12]EAS 452; 59 Stat. 1289.

by paragraph 1 of Article I of the Panama Canal Treaty:

(a) The Agreement confirming the cooperative agreement between the Panamanian Ministry of Agriculture and Livestock and the United States Department of Agriculture for the prevention of foot-and-mouth disease and rinderpest in Panama, entered into by an exchange of notes signed at Panama on June 21 and October 5, 1972,[13] and amended May 28 and June 2, 1974.[14]

(b) The Loan Agreement to assist Panama in executing public marketing programs in basic grains and perishables, with annex, signed at

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[13]TIAS 7482; 23 UST 3108.

[14]TIAS 7888; 25 UST 1522.

Panama on September 20, 1975.[15]

(c) The Agreement concerning the regulation of commercial aviation in the Republic of Panama, entered into by an exchange of notes signed at Panama on April 22, 1929.[16]

(d) The Air Transport Agreement signed at Panama on March 31, 1949,[17] and amended May 29 and June 3, 1952,[18] June 5, 1967,[19] December 23, 1974, and March 6, 1975.[20]

(e) The Agreement relating to

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[15]TIAS 8473; 28 UST 353.

[16]10 Bevans 729.

[17]TIAS 1932; 63 Stat. 2450; 10 Bevans 857.

[18]TIAS 2551; 3 UST 4087.

[19]TIAS 6270; 18 UST 1212.

[20]TIAS 8036; 26 UST 307.

the establishment of headquarters in Panama for a civil aviation technical assistance group for the Latin American area, entered into by an exchange of notes signed at Panama on August 8, 1952.[21]

(f) The Agreement relating to the furnishing by the Federal Aviation Agency of certain services and materials for air navigation aids, entered into by an exchange of notes signed at Panama on December 5, 1967 and February 22, 1968.[22]

(g) The Declaration permitting consuls to take note in person, or by authorized representatives, of declarations of

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[21]TIAS 2691; 3 UST 5064.

[22]TIAS 6471; 19 UST 4731.

values of exports made by shippers before customs officers, entered into by an exchange of notes signed at Washington on April 17, 1913.[23]

(h) The Agreement relating to customs privileges for consular officers, entered into by an exchange of notes signed at Panama on January 7 and 31, 1935.[24]

(i) The Agreement relating to the sale of military equipment, materials, and services to Panama, entered into by an exchange of notes signed at Panama on May 20, 1959.[25]

(j) The Agreement relating to the furnishing of defense articles and

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[23]TS 578; 10 Bevans 699.

[24]TIAS 3028; 5 UST 1520.

[25]TIAS 4234; 10 UST 1000.

services to Panama for the purpose of contributing to its internal security, entered into by an exchange of notes signed at Panama on March 26 and May 23, 1962.[26]

(k) The Agreement relating to the deposit by Panama of ten percent of the value of grant military assistance and excess defense articles furnished by the United States, entered into by an exchange of notes signed at Panama on April 4 and May 9, 1972.[27]

(l) The Agreement concerning payment to the United States of net proceeds from the sale of defense articles furnished under the military assistance program, entered into by an

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[26]TIAS 5081; 13 UST 1294.

[27]TIAS 7353; 23 UST 897.

exchange of notes signed at Panama on May 20 and December 6, 1974.[28]

(m) The General Agreement for Technical and Economic Cooperation, signed at Panama on December 11, 1961.[29]

(n) The Loan Agreement relating to the Panama City water supply system, with annex, signed at Panama on May 6, 1969, and amended September 30, 1971.[30]

(o) The Loan Agreement for rural municipal development in Panama, signed at Panama on November 28, 1975.[31]

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[28]TIAS 7977; 25 UST 3135.

[29]TIAS 4972; 13 UST 274.

[30]TIAS 8656; 28 UST 5711.

[31]TIAS 8925; 29 UST 2037.

(p) The Loan Agreement relating to a project for the modernization, restructuring and reorientation of Panama's educational programs, signed at Panama on November 19, 1975.[32]

(q) The Treaty providing for the extradition of criminals, signed at Panama on May 25, 1904.[33]

(r) The Agreement relating to legal tender and fractional silver coinage by Panama, entered into by an exchange of notes signed at Washington and New York on June 20, 1904,[34] and

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[32]TIAS 8647; 28 UST 5471.

[33]TS 445; 34 Stat. 2851; 10 Bevans 673.

[34]10 Bevans 681.

amended March 26 and April 2, 1930,[35] May 28 and June 6, 1931,[36] March 2, 1936,[37] June 1 1946,[38] May 9 and 24, 1950,[39] September 11 and October 22, 1953, August 23 and October 25, 1961,[39] and September 26 and October 23, 1962.[39]

(s) The Agreement for enlargement and use by Canal Zone of sewerage facilities in Colon Free Zone Area, entered into by an exchange of notes signed at Panama on March 8 and

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[35]10 Bevans 731.

[36]10 Bevans 734.

[37]10 Bevans 771.

[38]10 Bevans 834.

[39]Not printed.

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25, 1954.[40]

(t) The Agreement relating to the construction of the inter-American highway, entered into by an exchange of notes signed at Panama on May 15, and June 7, 1943.[41]

(u) The Agreement for cooperation in the construction of the Panama segment of the Darien Gap highway, signed at Washington on May 6, 1971.[42]

(v) The Agreement relating to investment guaranties under sec. 413(b)(4) of the Mutual Security Act of 1954, as amended, entered into by an

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[40]TIAS 2966; 5 UST 782.

[41]EAS 365; 57 Stat. 1298; 10 Bevans 826.

[42]TIAS 7111; 22 UST 602.

exchange of notes signed at Washington on January 23, 1961.[43]

(w) The Informal Arrangement relating to cooperation between the American Embassy, or Consulate, and Panamanian authorities when American merchant seamen or tourists are brought before a magistrate's court, entered into by an exchange of notes signed at Panama on September 18 and October 15, 1947.[44]

(x) The Agreement relating to the mutual recognition of ship measurement certificates, entered into by an exchange of notes signed at

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[43]TIAS 4976; 13 UST 293.

[44]Not printed.

Washington on August 17, 1937.[45]

(y) The Agreement relating to the detail of a military officer to serve as adviser to the Minister of Foreign Affairs of Panama, signed at Washington on July 7, 1942,[46] and extended and amended February 17, March 23, September 22 and November 6, 1959,[47] March 26 and July 6, 1962, and September 20 and October 8, 1962.[48]

(z) The Agreement relating to the exchange of official publications, entered into by an exchange of notes signed at Panama on November 27, 1941

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[45]EAS 106; 50 Stat. 1626; 10 Bevans 781.

[46]EAS 258; 56 Stat. 1545; 10 Bevans 817.

[47]TIAS 4773; 12 UST 718.

[48]TIAS 5226; 13 UST 2600.

and March 7, 1942.[49]

(aa) The Convention for the Prevention of Smuggling of Intoxicating Liquors, signed at Washington on June 6, 1924.[50]

(bb) The Arrangement providing for relief from double income tax on sipping profits, entered into by an exchange of notes signed at Washington on January 15, February 8, and March 28, 1941.[51]

(cc) The Agreement for withholding of Panamanian income tax from compensation paid to Panamanians

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[49]EAS 243; 56 Stat. 1444; 10 Bevans 805.

[50]TS 707; 43 Stat. 1363; 10 Bevans 717.

[51]EAS 221; 55 Stat. 1363; 10 Bevans 801.

employed within Canal Zone by the canal, railroad, or auxiliary works, entered into by an exchange of notes signed at Panama on August 12 and 30, 1963.[52]

(dd) The Agreement relating to the withholding of contributions for educational insurance from salaries paid to certain Canal Zone employees, entered into by an exchange of notes signed at Panama on September 8 and October 13, 1972.[53]

(ee) The Agreement for radio communications between amateur stations on behalf of third parties, entered into by an exchange of notes signed at Panama on July 19 and August 1, 1956.[54]

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[52]TIAS 5445; 14 UST 1478.

[53]TIAS 7509; 23 UST 3495.

[54]TIAS 3617; 7 UST 2179.

(ff) The Agreement relating to the granting of reciprocal authorizations to permit licensed amateur radio operators of either country to operate their stations in the other country, entered into by an exchange of notes signed at Panama on November 16, 1966.[55]

(gg) The convention facilitating the work of traveling salesmen, signed at Washington on February 8, 1919.[56]

(hh) The Reciprocal Agreement for gratis nonimmigrant visas, entered into by an exchange of notes signed at Panama on March 27 and May 22 and 25,

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[55]TIAS 6159; 17 UST 2215.

[56]TS 646; 41 Stat. 1696; 10 Bevans 714.

1956.[57]

(ii) The Agreement modifying the Agreement of March 27 and May 22 and 25, 1956 for gratis nonimmigrant visas, entered into by an exchange of notes signed at Panama on June 14 and 17, 1971.[58]

(jj) Any other treaty, convention, agreement or exchange of notes, or portions thereof, which does not concern the Panama Canal and which is in force immediately prior to the entry into force of the Panama Canal Treaty.

3. With reference to paragraph 2 of Article X (Employment with the Panama Canal Commission), concerning the

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[57]TIAS 3573; 7 UST 905.

[58]TIAS 7142; 22 UST 815.

endeavor to ensure that the number of Panamanian nationals employed in relation to the total number of employees will conform to the proportion established under Panamanian law for foreign business enterprises, it is recognized that progress in this regard may require an extended period in consonance with the concept of a growing and orderly Panamanian participation, through training programs and otherwise, and that progress may be affected from time to time by such actions as the transfer or discontinuance of functions and activities.

4. With reference to paragraph 10(a) of Article X, it is understood that the currently applicable United States law is that contained in Section

8336 of Title 5, United States Code.

5. With reference to paragraph 2 of Article XI (Transitional Provisions), the areas and installations in which the jurisdictional arrangements therein described shall apply during the transition period are as follows:

(a) The Canal operating areas and housing areas described in Annex A to the Agreement in Implementation of Article III of the Panama Canal Treaty.

(b) The Defense Sites and Areas of Military Coordination described in the Agreement in Implementation of Article IV of the Panama Canal Treaty.

(c) The Ports of Balboa and Cristobal described in Annex B of the Agreement in Implementation of Article III of the Panama Canal Treaty.

6. With reference to paragraph 4 of Article XI, the areas in which the police authorities of the Republic of Panama may conduct joint police patrols with the police authorities of the United States of America during the transition period are as follows:

(a) Those portions of the Canal operating areas open to the general public, the housing areas and the Ports of Balboa and Cristobal.

(b) Those areas of military coordination in which joint police patrols are established pursuant to the provisions of the Agreement in Implementation of Article IV of this Treaty, signed this date. The two police authorities shall develop appropriate administrative arrangements

for the scheduling and conduct of such joint police patrols.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal was signed at Washington on September 7, 1977, the text of which is hereto annexed;

The Senate of the United States of America by its resolution of March 16, 1978, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Neutrality treaty, subject to the following:

(a) AMENDMENTS:

(1) At the end of Article IV, insert the following:

"A correct and authoritative

statement of certain rights and duties of the Parties under the foregoing is contained in the Statement of Understanding issued by the Government of the United States of America on October 14, 1977, and by the Government of the Republic of Panama on October 18, 1977,[1] which is hereby incorporated as an integral part of this Treaty, as follows:

"'Under the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal (the Neutrality Treaty), Panama and the United States have the responsibility to assure that the Panama Canal will remain open and secure to ships of all nations. The

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[1]For joint Statement of Understanding, see Department of State Bulletin Nov. 7, 1977, p. 631.

correct interpretation of this principle is that each of the two countries shall, in accordance with their respective constitutional processes, defend the Canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels throughout the Canal.

"'This does not mean, nor shall it be interpreted as, a right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open, secure, and accessible, and it shall never be directed against the territorial integrity or political

independence of Panama.'."

(2) At the end of the first paragraph of Article VI, insert the following:

"In accordance with the Statement of Understanding mentioned in Article IV above: 'The Neutrality Treaty provides that the vessels of war and auxiliary vessels of the United States and Panama will be entitled to transit the Canal expeditiously. This is intended, and it shall so be interpreted, to assure the transit of such vessels through the Canal as quickly as possible, without any impediment, with expedited treatment, and in case of need or emergency, to go to the head of the line of vessels in order to transit the Canal rapidly.'."

(b) CONDITIONS:

(1) Notwithstanding the provisions of Article V or any other provision of the Treaty, if the Canal is closed, or its operations are interfered with, the United Sates of America and the Republic of Panama shall each independently have the right to take such steps as each deems necessary, in accordance with its constitutional processes, including the use of military force in the Republic of Panama, to reopen the Canal or restore the operations of the Canal, as the case may be.

(2) The instruments of ratification of the Treaty shall be exchanged only upon the conclusion of a Protocol of Exchange, to be signed by authorized representatives of both

Governments, which shall constitute an integral part of the Treaty documents and which shall include the following:

"Nothing in the Treaty shall preclude the Republic of Panama and the United States of America from making, in accordance with their respective constitutional processes, any agreement or arrangement between the two countries to facilitate performance at any time after December 31, 1999, of their responsibilities to maintain the regime of neutrality established in the Treaty, including agreements or arrangements for the stationing of any United States military forces or the maintenance of defense sites after that date in the Republic of Panama that the Republic of Panama and the United States of America

may deem necessary or appropriate.".

(c) RESERVATIONS:

(1) Before the date of entry into force of the Treaty, the two Parties shall begin to negotiate for an agreement under which the American Battle Monuments Commission would, upon the date of entry into force of such agreement and thereafter, administer, free of all taxes and other charges and without compensation to the Republic of Panama and in accordance with the practices, privileges,and immunities associated with the administration of cemeteries outside the United States of America by the American Battle Monuments Commission, including the display of the flag of the Untied States of America, such part of Corozal Cemetery in the

former Canal Zone as encompasses the remains of citizens of the United States of America.

(2) The flag of the United States of America may be displayed, pursuant to the provisions of paragraph 3 of Article VII of the Panama Canal Treaty,[1] at such part of Corozal Cemetery in the former Canal Zone as encompasses the remains of citizens of the Untied States of America.

(3) The President--

(A) shall have announced, before the date of entry into force of the Treaty, his intention to transfer, consistent with an agreement with the Republic of Panama, and before the date of termination of the Panama Canal

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[1]TIAS 10031; post, p.141.

Treaty, to the American Battle Monuments Commission the administration of such part of Corozal Cemetery as encompasses the remains of citizens of the United States of America; and

(B) shall have announced, immediately after the date of exchange of the instruments of ratification, plans, to be carried out at the expense of the Government of the United States of America, for--

(i) removing, before the date of entry into force of the Treaty,the remains of citizens of the United States of America from Mount Hope Cemetery to such part of Corozal Cemetery as encompasses such remains, except that the remains of any citizen whose next of kin objects in writing to

the Secretary of the Army not later than three months after the date of exchange of the instruments of ratification of the Treaty shall not be removed; and

(ii) transporting to the United States of America for reinterment, if the next of kin so requests, not later than thirty months after the date of entry into force of the Treaty, any such remains encompassed by Corozal Cemetery and, before the date of entry into force of the Treaty, any remains removed from Mount Hope Cemetery pursuant to subclause (i); and

(C) Shall have fully advised, before the date of entry into force of the Treaty, the next of kin objecting under clause (B)(i) of all available options and their implications.

(4) To carry out the purposes of Article III of the Treaty of assuring the security, efficiency, and property maintenance of the Panama Canal, the United States of America and the Republic of Panama, during their respective periods of responsibility for Canal operation and maintenance, shall, unless the amount of the operating revenues of the Canal exceeds the amount needed to carry out the purposes of such Article, use such revenues of the Canal only for purposes consistent with the purposes of Article III.

(d) UNDERSTANDINGS:

(1) Paragraph 1(c) of Article III of the Treaty shall be construed as requiring, before any adjustment in tolls for use of the Canal, that the

effects of any such toll adjustment on the trade patterns of the two Parties shall be given full consideration, including consideration of the following factors in a manner consistent with the regime of neutrality:

(A) the costs of operating and maintaining the Panama Canal;

(B) the competitive position of the use of the Canal in relation to her means of transportation;

(C) the interests of both Parties in maintaining their domestic fleets;

(D) the impact of such an adjustment on the various geographical areas of each of the two Parties; and

(E) the interests of both Parties in maximizing their international

commerce.

The United States of America and the Republic of Panama shall cooperate in exchanging information necessary for the consideration of such factors.

(2) The Agreement 'to maintain the regime of Neutrality established in the Treaty' in Article IV of the Treaty means that either of the two Parties to the Treaty may, in accordance with its constitutional processes, take unilateral action to defend the Panama Canal against any threat, as determined by the Party taking such action.

(3) The determination of 'need or emergency' for the purpose of any vessel of war or auxiliary vessel of the United States of America or the Republic of Panama going to the head of the line of

vessels in order to transit the Panama Canal rapidly shall be made by the nation operating such vessel.

(4) Nothing in the Treaty, in Annex A or B thereto, in the Protocol relating to the Treaty, or in any other agreement relating to the Treaty, obligates the United States of America to provide any economic assistance, military grant assistance, security supporting assistance, foreign military sales credits, or international military education and training to the Republic of Panama.

(5) The President shall include all amendments, conditions, reservations, and understandings incorporated by the Senate in this resolution of ratification in the

instrument of ratification in the instrument of ratification to be exchanged with the Government of the Republic of Panama.

The Neutrality Treaty was ratified by the President of the United States of America on June 15,1978, subject to the said amendments, conditions, reservations and understandings, in pursuance of the advise and consent of the Senate, and was ratified on the part of the Republic of Panama on June 6, 1978;

It is provided in Article VIII of the Neutrality Treaty that the Neutrality Treaty shall enter into force simultaneously with the Panama Canal Treaty, six calendar months from the date of the exchange of the instruments

of ratification;

The instruments of ratification of the Neutrality Treaty were delivered at Panama on June 16, 1978, with the exchange of the instruments of ratification effective on April 1, 1979, and accordingly the Neutrality Treaty, subject to the said amendments, conditions, reservations and understandings, enters into force on October 1, 1979;

NOW THEREFORE, I, Jimmy Carter, President of the United States of America, proclaim and make public the Neutrality Treaty, subject to the said amendments, conditions, reservations and understandings, to the end that it shall be observed and fulfilled with good faith on and after October 1, 1979, by

the Untied States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-fourth day of September in the year of our Lord one thousand nine hundred seventy-nine and of the Independence of the United Sates of America the two hundred fourth.

By the President:

Warren Christopher
Acting Secretary of State

Jimmy Carter

TREATY
CONCERNING THE PERMANENT NEUTRALITY AND OPERATION OF THE PANAMA CANAL

The United States of America and the Republic of Panama have agreed upon the following:

ARTICLE I

The Republic of Panama declares that the Canal, as an international transit waterway, shall be permanently neutral in accordance with the regime established in this Treaty. The same regime of neutrality shall apply to any other international waterway that may be built either partially or wholly in the territory of the Republic of Panama.

ARTICLE II

The Republic of Panama declares the neutrality of the Canal in order that both in time of peace and in time of war

it shall remain secure and open to peaceful transit by the vessels of all nations on terms of entire equality, so that there will be no discrimination against any nation, or its citizens or subjects concerning the conditions or charges of transit, or for any other reason, and so that the Canal, and therefore the Isthmus of Panama, shall not be the target of reprisals in any armed conflicts between other nations of the world. The foregoing shall be subject to the following requirements:

(a) Payment of tolls and other charges for transit and ancillary services, provided they have been fixed in conformity with the provisions of Article III (c);

(b) Compliance with applicable

rules and regulations, provided such rules and regulations are applied in conformity with the provisions of Article III;

(c) The requirement that transiting vessels commit no acts of hostility while in the Canal; and

(d) Such other conditions and restrictions as are established by this Treaty.

ARTICLE III

1. For purposes of the security, efficiency and proper maintenance of the Canal the following rules shall apply:

(a) The Canal shall be operated efficiently in accordance with conditions of transit through the Canal, and rules and regulations that shall be just, equitable and reasonable, and

limited to those necessary for safe navigation and efficient, sanitary operation of the Canal;

(b) Ancillary services necessary for transit throughout the Canal shall be provided;

(c) Tolls and other charges for transit and ancillary services shall be just, reasonable, equitable and consistent with the principles of international law;

(d) As a pre-condition of transit, vessels may be required to establish clearly the financial responsibility and guarantees for payment of reasonable and adequate indemnification, consistent with international practice and standards, for damages resulting from acts or

omissions of such vessels when passing through the Canal. In the case of vessels owned or operated by a State or for which it has acknowledged responsibility, a certification by the state that it shall observe its obligations under international law to pay for damages resulting from the act or omission of such vessels when passing through the Canal shall be deemed sufficient to establish such financial responsibility;

(e) Vessels of war and auxiliary vessels of all nations shall at all times be entitled to transit the Canal, irrespective of their internal operation, means of propulsion, origin, destination or armament, without being subjected, as a condition of transit, to

inspection, search or surveillance. However, such vessels may be required to certify that they have compiled with all applicable health, sanitation and quarantine regulations. In addition, such vessels shall be entitled to refuse to disclose their internal operation, origin, armament, cargo or destination. However, auxiliary vessels may be required to present written assurances, certified by an official at a high level of the government of the State requesting the exemption, that they are owned or operated by that government and in this case are being used only on government non-commercial service.

2. For the purposes of this Treaty, the terms "Canal," "vessel of war," "auxiliary vessel," "internal

operation," "armament" and "inspection" shall have the meanings assigned them in Annex A to this Treaty.

ARTICLE IV

The United States of America and the Republic of Panama agree to maintain the regime of neutrality established in this Treaty, which shall be maintained in order that the Canal shall remain permanently neutral, notwithstanding the termination of any other treaties entered into by the two Contracting Parties.[1]

ARTICLE V

After the termination of the Panama

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[1]Amended pursuant to Senate resolution advising ratification. See pp. 3 and 32. TIAS 10030; post, p. 39.

Canal Treaty,[1] only the Republic of Panama shall operate the Canal and maintain military forces, defense sites and military installations within its national territory.

ARTICLE VI

1. In recognition of the important contributions of the United States of America and of the Republic of Panama to the construction, operation, maintenance, and protection and defense of the Canal, vessels of war and auxiliary vessels of those nations shall, notwithstanding any other provisions of this Treaty, be entitled to transit the Canal irrespective of their internal operation, means of

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[1]Amended pursuant to Senate resolution advising ratification. See pp. 4 and 32.

propulsion, origin, destination, armament or cargo carried. Such vessels of war and auxiliary vessels will be entitled to transit the Canal expeditiously.[1]

2. The United States of America, so long as it has responsibility for the operation of the Canal, may continue to provide the Republic of Colombia toll-free transit through the Canal for its troops, vessels and materials of war. Thereafter, the Republic of Panama may provide the Republic of Colombia and the Republic of Costa Rica with the right of toll-free transit.

ARTICLE VII

1. The United States of America and the Republic of Panama shall jointly

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[1]TIAS 10029

sponsor a resolution in the Organization of American States opening to accession by all States of the world the Protocol to this Treaty whereby all the signatories will adhere to the objectives of this Treaty, agreeing to respect the regime of neutrality set forth herein.

2. The Organization of American States shall act as the depositary for this Treaty and related instruments.

ARTICLE VIII

This Treaty shall be subject to ratification in accordance with the constitutional procedures of the two Parties. The instruments of ratification of this Treaty shall be exchanged at Panama at the same time as the instruments of ratification of the

Panama Canal Treaty, signed this date, are exchanged. The Treaty shall enter into force, simultaneously with the Panama Canal Treaty, six calendar months from the date of the exchange of the instruments of ratification.[1]

ANNEX A

1. "Canal" includes the existing Panama Canal, the entrances thereto and the territorial seas of the Republic of Panama adjacent thereto, as defined on the map annexed hereto (Annex B), and any other inter-oceanic waterway in which the United States of America is a participant or in which the United States of America has participated in connection with the construction or financing, that may be operated wholly

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[1]Oct. 1, 1979.

or partially within the territory of the Republic of Panama, the entrances thereto and the territorial seas adjacent thereto.

2. "Vessel of war" means a ship belonging to the naval forces of a State, and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew which is under regular naval discipline.

3. "Auxiliary vessel" means any ship, not a vessel of war, that is owned or operated by a State and used, for the time being, exclusively on government non-commercial service.

4. "Internal operation"

encompasses all machinery and propulsion systems, as well as the management and control of the vessel, including its crew. It does not include the measures necessary to transit vessels under the control of pilots while such vessels are in the Canal.

5. "Armament" means arms, ammunition, implements of war and other equipment of a vessel which possesses characteristics appropriate for use for warlike purposes.

6. "Inspection" includes on-board examination of vessel structure, cargo, armament and internal operation. It does not include those measures strictly necessary for admeasurement, nor those measures strictly necessary to assure safe, sanitary transit and navigation,

including examination of deck and visual navigation equipment, nor in the case of live cargoes, such as cattle or other livestock, that may carry communicable diseases, those measures necessary to assure that heath and sanitation requirements are satisfied.